No. 87-2068 (1)

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In the Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC. And W.S. KIRKPATRICK & CO., INTERNATIONAL,

Petitioners,

vs.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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60 pp

QUESTION PRESENTED FOR REVIEW

Whether the act-of-state doctrine precludes adjudication of an action between private American litigants where:

(a) The action concerns Defendants' commercial bribery of Nigerians in order to deprive Plaintiff of a commercial contract with the Nigerian Air Force;

(b) The conduct in question constitutes a violation of the Foreign Corrupt Practices Act;

(c) The conduct is not the sovereign act of a foreign government and is, in any event, within the commercial activity exception to the act-of-state doctrine; and

(d) The United States Department of State has advised the lower courts that it does not believe the act-of-state doctrine precludes adjudication of the dispute.

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Dellapenna, *Deciphering the Act of State Doctrine*, 35 Vill. L. Rev. __ (1989) 48

Gevurtz, *The United States Approach to Combating Bribery in the International Sale of Goods*, Survey of the Int'l Sale of Goods 333 (1986) 31

Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds In International Trade*, 27 Va. J. Int'l Law 211 (1987) 29, 30, 45

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Note, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act Of State Doctrine?*, 17 Cornell Int'l L.J. 407 (1984) 29, 31

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In the
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OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., D.I.C. (HOLDING) INC.
And [illegible]KPATRICK & CO., INTERNATIONAL,
Petitioners,

vs.

[illegible]MENTAL TECTONICS CORPORATION,
INTERNATIONAL,
Respondent.

[illegible]OF CERTIORARI TO THE UNITED STATES
[illegible]OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Proceedings Below

This is an action by Environmental Tectonics Corporation, International ("ETC" hereafter), against W. S. Kirkpatrick & Co., Inc. ("Kirkpatrick" hereafter), its corporate parents and its corporate DISC subsidiary, as well as two of Kirkpatrick's corporate officers, one of its two corporate subcontractors and officers of both, for violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO" hereafter), 18 U.S.C. §§1961, *et seq.*, (Count I) (J.A. 71), the New Jersey RICO analog to the federal statute, N.J. Stat. Ann.

§§2C:41, *et seq.* (1982) (Count II) (J.A. 92), and the Robinson-Patman Act (Counts III and IV) (J.A. 73-75), 15 U.S.C. §§13(c), *et seq.* ETC seeks compensatory damages, statutorily trebled damages, attorney's fees, and punitive damages (Count VII) (J.A. 79). In addition, ETC has brought a libel/trade slander claim (Count V) (J.A. 76) and an interference with prospective contractual relationship claim (Count VI) (J.A. 78) against the corporate subcontractor and its president.

The action arises out of a contract award by the Minister of Defense of the Federal Republic of Nigeria to the Kirkpatrick DISC subsidiary for the purchase of "Devices and Spares for an Aeromedical Facility" at the Kaduna Air Force Base in Kaduna, Nigeria (J.A. 81) (the "Kaduna contract"). The contract required the Kirkpatrick DISC subsidiary to supply the hardware necessary to provide a turnkey job as to the facility. The total price payable to Defendants under the contract was $10,835,048.75 (J.A. 82).

ETC was the competing bidder for the Kaduna contract but lost the competition because the Defendants paid bribes, totalling $1,764,019.08, to various Nigerian government agents involved in the award of the contract (J.A. 58-68).

Plaintiff's Complaint—based upon guilty pleas entered before the United States District Court for the District of New Jersey by Defendant Kirkpatrick and its former executive, Defendant Carpenter[1] —contends that Defendants obtained the contract award by violating the Foreign Corrupt Practices Act, 15 U.S.C. §§78dd-1 *et seq.* Those violations, in turn, give rise to Plaintiff's entitlement to damages measured by lost profits under the RICO statutes (both federal and New Jersey) and the Robinson-Patman Act. The profit lost by ETC, before statutory trebling, was $3,000,000 (J.A. 71).

In addition, in Counts V and VI, ETC has sued one corporate subcontractor (Emro Engineering) and its president based on libelous statements made in a letter to the Nigerian Air Force in the course of the bidding process (J.A. 118-19).

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1. Defendant Carpenter, acting as agent for the other Defendants, negotiated the bribes with and through Defendant Akindele (J.A. 18). He also signed the contract on behalf of the Kirkpatrick Defendants (J.A. 103).

Finally, ETC seeks punitive damages (in Count VII) against all Defendants (J.A. 79).

In response to the original Complaint filed on February 4, 1986, certain Defendants[2] filed Motions to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure contending, *inter alia*, that the Complaint failed properly to allege a "pattern of racketeering activity" as required by the RICO statutes (J.A. 6). Plaintiff thereupon filed its Amended Complaint deleting one Defendant, adding six Defendants (the subcontractor Defendant, executives of both subcontractors, and another former president of Kirkpatrick) and adding the two common law Counts (J.A. 54). Plaintiff also filed its Answer to the remainder of the Defendants' 12(b)(6) Motion to Dismiss (J.A. 9).

In reply, Defendants urged, for the first time, that the act-of-state doctrine constituted a basis for dismissal pursuant to Rule 12(b)(6). In response to the assertion of the act-of-state defense, the District Court, Lechner, J., requested submissions from the parties in answer to a series of questions and requested an expression of opinion from the United States Department of State as to the applicability *vel non* of the act-of-state doctrine (J.A. 133). The parties responded with lengthy submissions directed to the specific questions posed by the court below (J.A. 165, 240).

The State Department likewise responded to Judge Lechner's request in a December 10, 1986, letter authored by former federal Judge Abraham Sofaer, Legal Advisor to the Department of State (J.A. 267). The submissions of the parties and of the State Department were considered by the District Court, along with a Rule 56(f) affidavit by ETC's counsel, in relation to the act-of-state issue, thereby converting the Motions to Dismiss into Motions for Summary Judgment pursuant to Rule 56 (J.A. 279).[3]

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2. Defendant Akindele, the intermediary for the other Defendants, has never been served (J.A. 3). Defendant International Development Corporation, S.A., the Luxembourg parent corporation of the Kirkpatrick Defendants, has likewise not been served (J.A. 3).

3. Although Defendants' initial Motions to Dismiss were directed

On May 1, 1987, the District Court filed an opinion and final order: granting summary judgment as to all Counts on behalf of all Defendants and against Plaintiff on the basis of the act-of-state doctrine; granting, in the alternative, Defendants' Motion to Dismiss as to the RICO Counts for failure sufficiently to plead a "pattern" of racketeering activity; and affirming, in the further alternative, the decision of the Magistrate who had allowed Defendant Carpenter to refuse to answer deposition questions on the basis of Carpenter's alleged Fifth Amendment privilege (J.A. 277, *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 659 F.Supp. 1381 (D.N.J. 1987)).

A timely notice of appeal was filed by ETC (J.A. 316). On May 2, 1988, the court below entered its order reversing the judgment of the District Court (J.A. 317, *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988)). The Court of Appeals concluded that Nigeria's award of this procurement contract is an act of state, 847 F.2d at 1058, and that the "commercial activity" exception to the act-of-state doctrine does not apply. 847 F.2d at 1059. The court below rejected *Clayco Petroleum*[4] as representing an "... expansive application of the act-of-state doctrine [which] seems at variance with the principle which has guided this court, that the doctrine is 'not lightly to be imposed.'" 847 F.2d at 1060, quoting from *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979).

Instead, the court below reversed the act-of-state inspired summary judgment of the District Court upon the following analysis:[5]

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against Plaintiff's original Complaint, the courts below treated the Motions as if filed against the Amended Complaint (J.A. 275). Likewise, Defendants who had not theretofore joined in the Motions joined in them at the time of oral argument in the District Court (J.A. 275). Respondent takes no issue with either of those procedural matters.

4. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

5. The court below also reversed the District Court's ruling as to the sufficiency of the pleadings to satisfy the "pattern" requirement of RICO

The traditional justification for involving the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own borders, is not present in this case. Appellant [Respondent ETC here] does not seek to have the Air Force contract invalidated, nor does it seek compensation for its alleged losses from the Nigerian government. No Nigerian official is named as a defendant in the complaint.

* * *

In sum, *the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of ETC's lawsuit.* We appreciate, of course, that the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts. But *the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.* As against that assessment, *defendants have not developed a factual record "showing that adjudication may hinder international relations. . . ."* [Citation omitted.]

This litigation falls squarely within the teaching of *Curtiss-Wright.* In both cases, the plaintiff sought damages from defendants who allegedly used illegal tactics to influence a foreign government's award of a contract. In both cases, *adjudicating the claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign*

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and as to the entitlement of individual Defendant Carpenter to refuse discovery on the basis of a Fifth Amendment claim based upon an alleged fear of criminal prosecution in Nigeria. 847 F.2d at 1062-66. In addition, contrary to Petitioners' renewed assertion in this Court (Brief for Petitioners at 3, n. 2), the court below found— correctly—that:

> As far as ETC's antitrust standing is concerned, the allegations in the amended complaint as a whole make out an actionable violation of section 2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c).

847 F.2d at 1066-67 (footnote omitted).

> *government's acts.* And, finally, the *defendants* in each case *failed to demonstrate that the litigation process was bound to result in the type of institutional conflict between the political and judicial branches that would justify invoking the doctrine.*

847 F.2d at 1061-62 (Emphasis supplied) (Footnotes omitted).

The Kirkpatrick defendants filed a timely Petition for Writ of Certiorari raising two issues in this Court: (1) the applicability of the act-of-state doctrine and (2) the sufficiency of the RICO pattern allegations. On June 26, 1989, this Court, after deciding *H. J. Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. 2893 (1989), and after requesting and receiving the views of The United States as *amicus*, granted the Petition, limiting the Writ of Certiorari to the act-of-state question.

STATEMENT OF THE FACTS

Defendant Kirkpatrick is a New Jersey corporation having its principal place of business in Fairfield, New Jersey (J.A. 56). Defendant DIC (Holding) Inc. ("DIC" hereafter) is a Delaware corporation which owns all of the stock of Kirkpatrick. DIC, in turn, is wholly owned by Defendant International Development Corporation, S.A. ("IDC" hereafter), a Luxembourg corporation (J.A. 56, 59). Defendant W. S. Kirkpatrick & Co., International ("International" hereafter), is the DISC corporation organized by Kirkpatrick, DIC and IDC to be the contracting party with the Nigerian government on the Kaduna contract (J.A. 60-62).

Defendant Carpenter first became an employee of Kirkpatrick in 1954 (J.A. 58). By January 1978, he had become Chairman of Kirkpatrick's Board of Directors and its Chief Executive Officer. On January 3, 1978, he sold all of his shareholder and equity interest in Kirkpatrick to DIC and entered into a consulting and employment agreement with Kirkpatrick and DIC whereby he continued as Chairman of the Board and Chief Executive Officer of Kirkpatrick through December 31, 1982 (J.A. 59).

During all pertinent times, Defendant Kirkpatrick sold

and brokered equipment, parts and facilities relating to aircraft and aircraft facilities, both domestically and to airlines, airports and national air forces doing business outside the continental United States (J.A. 58). In 1980, while acting as Chairman and Chief Executive Officer of Kirkpatrick, Carpenter learned of an opportunity to sell aeromedical equipment, including ejection seat trainers, disorientation simulators and other devices, to the Nigerian Air Force and for the construction of an aeromedical center at Kaduna Air Force Base, Nigeria (J.A. 62). At the time, Kirkpatrick had no independent capacity to design, build or supply such a facility. Accordingly, shortly thereafter, Carpenter and Kirkpatrick solicited the services of Defendant Emro, through its president Ruppert, to design the equipment and to provide engineering services incident to the Nigerian contract opportunity (J.A. 62). Likewise, Kirkpatrick lacked the independent ability to manufacture or supply the equipment required by the contract. Thus, Carpenter and Kirkpatrick solicited Nautilus Enviromedical Systems, Inc. ("Nautilus" hereafter), through its President, Defendant Ross E. Saxon ("Saxon" hereafter), to act as the subcontractor, manufacturer and supplier of the medical equipment (J.A. 62).

Plaintiff Environmental Tectonics Corporation, International, is a Delaware corporation having its principal place of business in Southampton, Pennsylvania, and is Kirkpatrick's American competitor (J.A. 56, 63). ETC is engaged in the business of designing, building, manufacturing, supplying, selling and installing aeromedical equipment and facilities both domestically and to airlines, airports and national air forces outside the continental United States (J.A. 63). In contrast to Kirkpatrick and its corporate relatives, however, ETC has the independent ability to design, manufacture, supply and install both the facility to house the aeromedical service and the component parts (J.A. 63).

On or about February 2, 1981, when ETC learned that the Nigerian Air Force was contemplating the purchase of physiological training equipment and the construction of an aeromedical center at Kaduna Air Force Base, ETC immedi-

ately submitted *pro forma* pricing information to its agent which, in turn, forwarded that pricing information to the responsible Nigerian authorities (J.A. 65, 77).

Regrettably, at about the same time, while ETC was submitting its initial pricing proposal, Defendant Carpenter, on behalf of all Defendants, met with Defendant Benson "Tunde" Akindele and one Alhaji Ringim to discuss a poorly disguised bribe. As appears in Carpenter's contemporaneous memorandum of March 30, 1981, the following occurred (J.A. 212-15):

> At the first meeting with Benson Akindele, we [Defendant Saxon of Nautilus and Carpenter] spent all of the necessary time giving him all of the massive technical brochures that we brought with us. Everything was explained in complete detail, and he was completely satisfied. It was simply left that there would probably be required a trip to Lagos by myself or someone from Kirkpatrick, plus Saxon and Ruppert [of Defendant Emro], at some point in April or early May to finalize technical questions.
>
> We then got into the pricing, and we told Benson that his cost or the cost that Kirkpatrick was proposing approximated $7,525,000 .... We then told him that we wanted to review the commission situation which we felt was rather high. Akindele met this question head-on and stated that he himself would be satisfied with a 3% commission on a project of this magnitude. However, he reviewed in great detail the habits of Nigeria and the expectations of many, and stated that we must think in terms of a 20% margin, and this would include 5% for Alhaji Ringim, if necessary, to put the project "over the top".
>
> We then told Akindele that this meant that our quotation would have to be in the area of $9,400,000. He replied to us that the reason for his week's delay in coming to London was to have a chance to have a secret look at the other two quotations made by European con-

cerns, and that there should be no problem for us to up our quotation so that the total CIF Nigeria price would come to approximately $10,750,000.[6]

Ross [Saxon] and I then went back to the hotel, and Ross re-calculated the entire project based on a proportionate increase for each of the three companies so as to reasonably share this increase. This eventually came out to a total commission of $1,900,000 plus,[7] and with Kirkpatrick having a potential profit of $1,700,000. Our final offer, after another conference with Akindele, was $11,100,000 delivered to site turnkey Kaduna, Nigeria. . . .

.. this point, we were obviously well pleased since Benson felt that this total price was still very acceptable in relation to the two European bids, and each party had increased their profit base. We told Akindele that we were also going to visit with Alhaji Ringim, keep him involved, and Akindele agreed.

* * *

The final conference that I had with Akindele was in the company of his very experienced English lawyer, Mr. Jeffrey Tesler, of the firm of Michael D. Kaye & Co. Tesler is very knowledgeable on Nigerian affairs since he and his partners maintain an office in Lagos, and also about the problems of U.S. companies re commission payments. The problem for all American concerns is that Europeans readily provide such high commissions, as required and asked for by the customers, without any government interference. In fact, Mr. Tesler stated what I had heard repeatedly from other sources that the French will pay commissions of 25% on projects that they bid, and that the entire commission will be paid up front after

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6. Defendants' bid, as accepted by Nigeria, was for $10,835,048.75 (J.A. 82).

7. Defendants ultimately paid a "commission" of $1,764,019.58 (J.A. 66-67).

receipt of the contract, the letter of credit and the down payment.

Mr. Tesler stated that . . . the 20% commission would be broken down into two components:

1. 10% for a company based on direct relations and assistance to achieve this contract. It will be a 5 to 6 page agreement form provided, listing the services this organization is to provide. It is a bearer share corporation.

2. A firm retained by us to do research and long term marketing planning for Western Africa covering approximately 10% of the commission for this contract. Again a bearer share corporation with full details as to the services they are to provide included in the agreement form.

In May 1981, less than two months after the meeting amongst Defendants and their representatives regarding these "commissions", two Panamanian bearer share corporations—Deriks and Los—were established whereby, pursuant to written agreements, Kirkpatrick was to pay them a commission equal to 20% of the prices agreed to be paid by Nigeria for the aeromedical facility (J.A. 36, 64). These Panamanian bearer share corporations were controlled by Defendant Akindele for the sole purpose of receiving the "commission" payments from Defendants and then to distribute the sums thereby received (J.A. 129, 217).

In July 1981, ETC pursued its endeavor to obtain the Nigerian contract by contacting the Armed Forces Attache of the Nigerian Embassy in Washington, D.C. (J.A. 129). In September 1981, ETC's President attended the International Congress on Aviation Medicine in Nancy, France; while there he met with Nigerian Air Force officials and reviewed with them the aeromedical needs at Kaduna (J.A. 129-30). In December 1981 ETC's president travelled to Lagos, Nigeria, for business meetings with Nigerian Air Force officials and to submit a formal bid on the Kaduna aeromedical contract (J.A.

130). In February 1982, ETC's president returned to Lagos and submitted ETC's final formal bid (J.A. 130).

Again, while ETC legitimately sought the Kaduna contract, Defendants pursued their criminal scheme. After creating the two Panamanian bearer share corporations mentioned above, Messrs. Akindele and Ringim continued to meet with Defendants. In particular, Defendants Carpenter and Saxon, acting on behalf of the Defendants, met with Akindele and Ringim through at least March 5, 1982. In fact, Defendants agreed, as of September 1981, that their 20% "commission" on the Nigerian contract would be distributed as follows (J.A. 18, 36):

2½ %—for Akindele
5 %—for air force
2½ %—medical group
5 %—party
2½ %—minister himself
2½ %—other key defense personnel.

On March 19, 1982, a contract was entered into between the Nigerian Ministry of Defense and Kirkpatrick's DISC corporation for purchase of the aeromedical equipment and turnkey construction of the facility at a total price of slightly over $10,800,000 (J.A. 82).

In September 1982, Nigeria made its initial payment to Defendants pursuant to the terms of that contract; immediately thereafter, on September 30, 1982, by use of the United States mails and certain wire transfers, Defendants paid $117,929.34 and $193,657.70, respectively, to the Panamanian corporations, Deriks and Los. The funds were then distributed by the Panamanian corporations to, or on behalf of, Defendant Akindele and the various Nigerian political and military figures in the agreed-upon percentages (J.A. 19, 37, 66-67).

In December 1982, Nigeria made the next progress payment on the contract; on December 21, 1982, $290,486.50 was funneled to each of the Panamanian corporations by Defendants and distributed to, or on behalf of, Defendant

Akindele and the Nigerian political and military officials (J.A. 19, 37, 66-67).

In February 1983, Nigeria made its next progress payment; payments, each in the amount of $145,243.27, were immediately thereafter made to each of the Panamanian corporations and distributed in the amounts and for the purposes already described (J.A. 19, 37, 66-67).

Finally, in August 1983, Nigeria made its last progress payment and immediately—on August 8, 1983—Defendants caused payments of $290,486.50 to be made to each of the Panamanian corporations and consequent distribution of those funds in the amounts and to the persons as described in Carpenter's March 8, 1982 memorandum (J.A. 19, 37, 66-67). The amounts distributed by Defendants to the Panamanian corporations for the intended "commission" recipients, totalled $1,764,019.58, 20% of the funds received by the Defendant corporations from Nigeria pursuant to the Kaduna contract (J.A. 66).

In April 1983, after learning that its bid price for the aeromedical facility was several million dollars lower than the Kirkpatrick price for the same equipment, ETC investigated the contract award and reported the results to the Nigerian Air Force and to the United States Embassy in Lagos (J.A. 32). Subsequently, the Federal Bureau of Investigation and the United States Justice Department investigated. As a consequence, criminal Informations were filed in the United States District Court for the District of New Jersey (J.A. 15, 33), and a plea bargain was struck involving both Defendant Carpenter and Defendant Kirkpatrick. As to Carpenter, he was charged with—and pled guilty to—one count of violating the Foreign Corrupt Practices Act, 15 U.S.C. §78dd-2, relating to the December 21 payments referred to above (J.A. 21). As to Defendant Kirkpatrick, it was charged with—and pled guilty to—one count of violating the Foreign Corrupt Practices Act, relating to the same December 1982 payments (J.A. 39).

In its Offer of Proof to support the guilty pleas in the United States District Court for the District of New Jersey (Rodriguez, J.), the United States and Defendant Kirkpatrick,

by its present counsel, agreed that the evidence at trial would show that:

> In 1981, Harry G. Carpenter, who was at that time Chairman of the Board and Chief Executive Officer of Kirkpatrick, learned of an opportunity for Kirkpatrick to sell aero medical equipment consisting of ejection-seat trainers, disorientation simulators and other devices to the Nigerian Air Force for an Aero Medical Center in Kaduna Air Force Base in Nigeria. Carpenter believed that Kirkpatrick needed an agent in Nigeria to assist in negotiating and obtaining the contract.
>
> On the recommendation of two British businessmen, Carpenter contacted a London solicitor, who in turn put him in touch with Benson "Tunde" Akindele ("Akindele"), a Nigerian national.
>
> Akindele offered to assist Kirkpatrick by serving as its local agent in Nigeria. Carpenter negotiated an agreement with Akindele which provided that Kirkpatrick would pay a commission equal to twenty percent of the contracted price of the Aero medical equipment to "Deriks" and "Los", two Panamanian bearer share corporations, which were set up, and controlled by, Akindele to receive the payments from Kirkpatrick.
>
> Contracts between Deriks and Los and Kirkpatrick were signed in May 1981. Kirkpatrick then increased its bid price to the Government of Nigeria to include the twenty percent to be paid to Akindele. Akindele began to assist Carpenter and Kirkpatrick in negotiating with various Nigerian officials.
>
> In September, 1981, Akindele advised Carpenter that the twenty percent commission that Akindele would receive on the Aero medical contract from Kirkpatrick would be paid to himself and various Nigerian political and military figures as follows: .... [See p. 11, *supra.*) The understanding Akindele communicated to Carpenter was that the payments were to be made to the

above-cited political and military figures in Nigeria in order for W. S. Kirkpatrick to obtain the 10.8 million dollar Aero medical contract from the Government of Nigeria.

* * *

Thereafter, Kirkpatrick paid 20 percent of the price which it received for performance of the Nigerian contract to Akindele through Deriks and Los.

The payments were made as follows: .... [See pp. 11-12, *supra*]

The payment charged in the information is the second payment. The second payment to Deriks and Los occurred on December 21, 1982, when, as a result of having entered into the agreement with Deriks and Los, Kirkpatrick caused to be sent a Western Union International telex from Fairfield, New Jersey to New York City, New York ordering the Standard Chartered Bank of New York to pay $580,973.00 to the Bank of New York for the account of Deriks and Los at the Bank of Commerce and Credit International in Luxembourg.

(J.A. 35-37).[8]

Defendant Carpenter was sentenced to pay a fine of $10,000.00 and to perform 200 hours of community service (J.A. 31-32); corporate Defendant Kirkpatrick was sentenced to pay a fine of $75,000 over a period of five years commencing in January 1986 (J.A. 52).

Upon learning of the guilty pleas by Defendants Carpenter and Kirkpatrick, ETC consulted counsel and filed the instant action in the United States District Court for the District of New Jersey on February 26, 1986 (J.A. 4).

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8. An essentially identical Offer of Proof, agreed to both by Defendant Carpenter individually and by his attorney, was filed with respect to Defendant Carpenter (J.A. 17). These Offers of Proof were both before the court below and are of record in the respective criminal proceedings before the United States District Court for the District of New Jersey.

ARGUMENT

SUMMARY OF ARGUMENT

Respondent first contends that the decisions of this Court in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), and *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690 (1962), require affirmance in this case because this litigation concerns violations of American law (the Federal Corrupt Practices Act, the Robinson-Patman Act, state and federal Racketeer Influenced and Corrupt Organizations statutes and the common law) by parties subject to the personal and subject matter jurisdiction of American federal courts. Hence, irrespective of the fact that the criminal violations by these Defendants also involve misconduct by foreign officials, those violations are not immune from American judicial examination under the act-of-state doctrine.

Respondent also contends that the conduct placed in issue by this litigation does not—and cannot—constitute an "act of state." That is, the bribes which underlie this civil action—and the receipt of such bribes by agents of the Nigerian government—do not constitute an exercise of sovereign power and, therefore, are not acts of state. Hence, in the absence of an act of state, the act-of-state doctrine provides no basis for a refusal by federal courts to adjudicate litigation before them.

Third, Respondent argues that even if an act of state were found to exist: (a) the *Sabbatino* test is satisfied and the doctrine does not apply; (b) the "commercial activity" exception to the doctrine arises from the facts of this case and the doctrine does not apply; and the State Department's representation to the District Court satisfies both (c) the *Bernstein* exception to the act-of-state doctrine and (d) the distinction between inquiries into the motivations of foreign governments (which are permissible) and inquiries into the legal validity of intraterritorial acts by foreign governments (which are not permissible) so as to make the doctrine inapplicable in any event. That is, in *Sabbatino* this Court defined a two-

pronged test to determine whether application of the act-of-state doctrine is necessary in order to reflect a "proper distribution of functions between the judicial and political branches of the government on matters of foreign affairs." In this instance, application of that two-part *Sabbatino* test demonstrates that proper distribution of functions permits the Judicial Branch to act in this matter.

Further, the "commercial activity" exception to the doctrine is applicable to the facts of this case. The transaction involves merely a contract by a foreign government to buy equipment for its armed forces. Hence, the transaction satisfies the definition of "commercial activity" laid down by Congress in the Foreign Sovereign Immunities Act. Therefore, this Court should construe the act-of-state doctrine in parallel with the Foreign Sovereign Immunities Act.

In addition, the Legal Advisor to the Department of State has informed the courts below that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of this lawsuit. The State Department has thereby satisfied the *Bernstein* exception to the act-of-state doctrine. In any event, the State Department letter has drawn the distinction between permissible inquiries into the motivations for governmental acts as opposed to impermissible inquiries into the validity of the foreign government's acts. That distinction—motivation versus legality—also justifies non-application of the act-of-state doctrine to the facts of this case.

Finally, Respondent urges that the Court accept this opportunity to re-define the act-of-state doctrine. Respondent urges that, in doing so, the Court adopt the rule that, except in the rare instance where the Executive Branch gives an appropriate representation to the court and demonstrates an acceptable justification for a refusal to exercise judicial power, the federal courts treat litigation involving foreign governmental activities no differently than they treat litigation involving activities of American domestic governmental agencies. That is, Respondent urges that in this case, and in every case, the federal courts exercise their power to hear and try cases, save and except in those instances where the Executive

Branch successfully establishes that trial of the case would jeopardize American foreign policy.

I. THE RULE OF LAW REFLECTED IN *UNITED STATES V. SISAL SALES CORP.*, 274 U.S. 268 (1927), AND *CONTINENTAL ORE CO. V. UNION CARBIDE & CARBON CORP.*, 370 U.S. 690 (1962), REQUIRES AFFIRMANCE IN THIS CASE.

As this case demonstrates, in every lawsuit involving illegal overseas payments, it is to be anticipated that the act-of-state defense will be raised by the errant payor. Because the Foreign Corrupt Practices Act, 15 U.S.C. §78dd-2, makes certain types of payments to representatives of foreign governments unlawful,[9] it is inherent in the proscribed transactions that courts of the United States may be called upon to examine acts done by a government in its own territory. *Cf. Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Specifically, because the Act prohibits the giving or offering of anything of value to a foreign official for the purpose of obtaining or retaining business, 15 U.S.C. §78dd-2(a)(2), litigation involving such conduct will of necessity implicate: (a) the purpose of the offer or the payment and, perhaps, (b) the causative effect of the offer or payment, i.e., whether the offer or payment in fact resulted in the obtaining or retention of business.[10] Thus, if the act-of-state doctrine bars the present civil

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9. The Foreign Corrupt Practices Act also, of course, addresses matters other than the payments themselves, *e.g.*, reporting requirements, and so forth. 15 U.S.C. §78m(b) (1982).

10. To the extent causation must be proven—*i.e.*, that official Nigerian acts were in fact influenced and not merely intended to be influenced—the situation here is not unlike that described by Judge Weis in *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982):

> It appears to us that Curtiss-Wright's concerns are more with difficulties in the production of evidence than with disruption of foreign relations. It is true that plaintifff must prove that damage resulted from the alleged illegal activity. But if the parties cannot obtain direct evidence from the foreign governments, other sources or proof may still be available. See *Continental Ore Co. v. Union Carbide & Carbon Corp*, 370 U.S. at 696-97, 82 S.Ct. at

> 1409. Certainly, at this stage of the litigation, we cannot say that the only relevant and admissible evidence can come from the foreign governments themselves or that they will be uncooperative.
>
> The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations. *See Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d at 55; *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1977). As we have said before, in antitrust litigation there is a public interest in clearing monopolistic activities from the channels of American commerce, even though some of the conduct occurred in foreign countries. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d at 1293.

694 F.2d at 304.

The current state of the record establishes that: Respondent was low bidder for the contract in question and, according to the evidence of its Chief Executive Officer, would have received such contract but for bribes paid by Petitioners. Further, Petitioners received the contract, and received payment thereunder, notwithstanding Respondent's being low bidder. Likewise, immediately upon receiving payments from the Republic of Nigeria, Petitioners made the agreed-upon $1.7 million "commission" payments to the two Panamanian corporations established pursuant to their instructions, and the payments were to be distributed therefrom to government officials in the proportions theretofore authorized by Petitioners.

These facts, standing alone, establish *prima facie* RICO and Robinson-Patman 2(c) violations. See 347 F.2d 1066. For example, in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), a suit by a frustrated competitor against both the bribe giver and bribe recipient, the latter being an official of the State of Idaho, the bribe payor and bribe recipient each testified that the purpose of the payments was not the award of Idaho state business; rather, each said the payments had a different purpose. The District Court rejected these explanations and found, as a fact, that the purpose of the payments was, "at least in substantial part, of influencing [the bribe recipient's] conduct as an employee of [the purchaser] with respect to recommendations . . . for purchase . . ." *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F.Supp. 393, 395 (D. Idaho 1964). Because of the circumstances surrounding the payments—including the secrecy of the payments, the fact that the payments went to the state employee's wife and not directly to such employee, and that the payments stopped when Idaho's purchases stopped—the Ninth Circuit affirmed the factual finding, albeit based upon inference and in the face of explicit denials, that bribes were in fact paid in violation of the Robinson-Patman Act, 15 U.S.C. §13(c). *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d at 854-55. *See also Computer Statistic, Inc. v. Blair*, 418 F.Supp. 1339 (S.D. Tex. 1976).

action, no civil recovery can ever be had against a Foreign Corrupt Practices Act violator.

This conclusion is belied by this Court's decisions in *Sisal Sales* and *Continental Ore*.[11] These decisions establish that where, as here, there is a violation of American law by parties subject to the personal and subject matter jurisdiction of the American federal courts, the malefactors may be "punished"—civilly and criminally—irrespective of the concurrent acts of some foreign government or its officials. *See also, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d 48, *reh. denied*, 599 F.2d 449 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982); and *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

In *United States v. Sisal Sales Corp.*, 274 U.S. 268, 271 (1927): "[t]he United States [sought] an injunction to prevent appellees from taking further action in pursuance of a contract, combination or conspiracy said to be forbidden by the Sherman Anti-Trust Act and the Wilson Tariff Act. . . ." Among the facts alleged was that favorable legislation had been secured by the defendants from the Mexican national and Yucatan provincial governments, 274 U.S. at 272-73, whereby defendants were able successfully and profitably to monopolize the sale of sisal in the United States. 274 U.S. at 274.

This Court rejected the monopolists' assertion of the act-of-state doctrine. First, the Court distinguished the act-of-state doctrine as articulated in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), saying:

> The circumstances of the present controversy are radically different from those presented in American Banana Co. v. United Fruit Co., supra, and the doctrine there approved is not controlling here. The Banana Company sued for treble damages under the Sherman Act,

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11. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

> basing its claim upon acts done outside the United States *and not unlawful by the law of the place.*

Sisal Sales at 275-76 (Emphasis supplied).[12]

Then this Court unanimously held:

> The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. *True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.*

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12. Petitioners correctly concede that *American Banana* has been "subsequently discredited" in at least one aspect. Brief for Petitioners at 15. Further, as the United States noted in its Brief as *amicus curiae* filed in response to the Court's Order anent the Petition for a Writ of Certiorari:

> This Court has never clarified the extent to which the holding of *American Banana* survives *Sisal Sales* and *Continental Ore*, although in *Sabbatino* the Court referred to *American Banana* as one of several decisions "directly or peripherally" involving the act of state doctrine that did not "manifest any retreat from *Underhill*" (376 U.S. at 416).[12]
>
> 12. The lower courts have generally concluded that the holding of *American Banana* has survived *Sisal* and *Continental Ore*, although they have sometimes distinguished *American Banana* and found the act of state doctrine inapplicable in the particular case. Compare *Mitsui*, 594 F.2d at 52-54 (doctrine inapplicable), with *Hunt*, 550 F.2d at 73-75 (doctrine applicable), and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. at 109-110 (same).

Brief for the United States as Amicus Curiae at 15-16.

In this case, even if *American Banana* survives *Sisal Sales*, the *American Banana* test is met since the *sine qua non* of the *American Banana* holding—according to this Court's opinion in *Sisal Sales*—is that the acts done in the foreign country be ". . . not unlawful by the law of the [foreign country]", 274 U.S. at 276. Here, of course, the acts of bribery are unlawful under Nigerian law, both as to the payor and as to the recipient. J.A. 348 *et seq.*

274 U.S. at 276. (Emphasis supplied.)

Here, as in *Sisal Sales*, Plaintiff-Respondent complains of a violation of American statutory laws by parties subject to the jurisdiction of the federal courts. These violations, albeit aided by misconduct of foreign officials, are the result of the defendants' own deliberate acts, here and elsewhere, which are prohibited by the Foreign Corrupt Practices Act, by the Robinson-Patman Act, by the federal Racketeer Influenced and Corrupt Organizations Act, by the New Jersey Anti-Racketeering Act and by the common law.

Similarly, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), a private treble damage action under the American antitrust laws for alleged monopolization in the sale and production of vanadium involving, in part, an agency of the Canadian Government, the act-of-state doctrine as reflected in *American Banana* was again raised as a defense. This Court unanimously rejected the defense and interpreted the *Sisal Sales* reading of *American Banana* as saying:

> Since the activities of the defendants had an impact within the United States and upon its foreign trade, American Banana was expressly held not to be controlling.

370 U.S. at 705 (footnote omitted).

By way of explaining rejection of the act-of-state defense, the Court (per Mr. Justice White) went on to say:[13]

> In the present case petitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller. Nor is there left in the case any question of the liability of the Canadian Government's

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13. Noteworthy in this explanation is that the Court specifically observed that no question existed as to "the validity of any action taken by the Canadian Government or by its Metal Controller" or as to the liability of the Canadian Government. 370 U.S. at 706. Here, too, no question is raised as to the validity of the Kirkpatrick-Nigeria contract—*i.e.*, the enforceability of the contract *inter se*—or the liability of the Republic of Nigeria. See 847 F.2d at 1061.

> agent, for Electro Met of Canada was not served. *What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy,* to influence or to direct the elimination of Continental from the Canadian market. *As in Sisal, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.*
>
> . . . The offer of proof at least presented an issue for the jury's resolution as to whether the loss of Continental's Canadian business was occasioned by respondents' activities. Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law.[14] There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme. (Citations omitted.)

370 U.S. at 706-07 (emphasis supplied).

Here, too, the claim is that the Kirkpatrick defendants are liable for actions which they themselves jointly took, in violation of American law, intending to eliminate—and succeeding in eliminating—ETC from the Nigerian market.

Here, too, the act-of-state doctrine has no place. For this reason alone, the judgment of the court below should be affirmed.

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14. Again, and by way of contrast, the acts committed in Nigeria and in London and in America were *not* permitted by Nigerian law. J.A. 348, *et seq.*

II. THE CONDUCT HERE COMPLAINED OF—BRIBING NIGERIAN OFFICIALS IN VIOLATION OF AMERICAN LAW, IN VIOLATION OF NIGERIAN LAW, AND IN VIOLATION OF EVERY KNOWN STANDARD OF INTERNATIONAL CONDUCT—DOES NOT CONSTITUTE AN ACT OF STATE.

As a threshold proposition, for the act-of-state doctrine to apply, an act-of-state *qua* act-of-state must be placed in issue. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976); *Republic of Philippines v. Marcos,* 806 F.2d 344 (2d Cir. 1986), *cert. dismissed sub nom., Ancor Holdings, N.W. v. Republic of Philippines,* 480 U.S. 942, and *cert. denied,* 481 U.S. 1048 (1987); *Republic of Philippines v. Marcos,* 862 F.2d 1355, 1360-1361 (9th Cir. 1988) *(en banc), cert. denied,* 109 S. Ct. 1933 (1989); *Jimenez v. Aristeguieta,* 311 F.2d 547 (5th Cir. 1962).

There is, of course, unanimity in this Court on that elementary proposition as reflected in the Court's most recent act-of-state ruling: *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976).[15] For the Court (including Mr. Justice Stevens, concurring, 425 U.S. at 716), this reasoning is reflected in the following passage:

> We thus disagree with the Court of Appeals that the mere refusal of the interventors to repay funds followed by a failure to prove that interventors "were not acting within the scope of their authority as agents of the Cuban government" satisfied respondents' burden of establishing their act of state defense. *Menendez v. Saks & Co.,* 485 F.2d, at 1371. Nor do we consider *Underhill v. Hernandez,* 168 U.S. 250 (1897), heavily relied upon by the Court of Appeals, to require a contrary conclusion. In that

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15. While *Alfred Dunhill* reflects a difference of view within the membership of the Court as to the existence *vel non* of a "commercial activity" exception to the act-of-state doctrine, the decision narrowly turns on whether the party with the burden of proof in that case—the Respondent Republic of Cuba—had met its burden. See Opinion of Mr. Justice Stevens, concurring, 425 U.S. at 716.

> case and in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), and *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918), it was apparently concluded that the facts were sufficient to demonstrate that *the conduct in question was the public act of those with authority to exercise sovereign powers* and was entitled to respect in our courts. We draw no such conclusion from the facts of the case before us now. As the District Court found, the only evidence of an act of state other than the act of nonpayment by interventors was "a statement by counsel for the interventors, during trial, that the Cuban Government and the interventors denied liability and had refused to make repayment." *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F.Supp. at 545. But this merely restated respondents' original legal position and adds little, if anything, to the proof of an act of state. No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had *as a sovereign matter* determined to confiscate the amounts due three foreign importers.

425 U.S. at 694-95 (emphasis supplied) (footnote omitted).

For the dissenting members of the Court, Mr. Justice Marshall wrote:

> If the foreign state has exercised a sovereign power either to act or to refrain from acting there is an act of state.

425 U.S. at 720 (Marshall, J., dissenting).

Hence, the first inquiry must be: Is there an act of state placed at issue here? The answer to that inquiry is: No. The criminal act of offering and paying bribes is not entitled to protection—is not a public act; the criminal act of receiving bribes is not an exercise of sovereign power.[16]

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16. It bears repetition that this case does not address the validity *vel non* of the Kirkpatrick-Nigeria contract. The focus is on—and must stay on—the bribe-paying conduct of the defendants. It is, of course, clear however that the *receipt* of the bribe by the Nigerian officials was (and is) a

Two decisions of the Courts of Appeals aptly illustrate this proposition in the context of official corruption: *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), and *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986).[17] In *Jimenez*, the former president/dictator of Venezuela sought *habeas corpus* relief from an extradition order contending that financial dealings found by the District Court to be "crimes" within the relevant extradition treaty were not, in law, subject to review because of the act-of-state doctrine, *i.e.*:

> Appellant contends that the acts with which he is charged are "acts done in the exercise of or in color of his sovereign authority and by virtue of the law of nations as stated in Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456, was entitled to be discharged from custody inasmuch as the judicial authorities cannot review the acts done by a sovereign in his own territory to determine illegality".

Jimenez, 311 F.2d at 557 (footnote omitted).

The Fifth Circuit rejected this argument, noting:

> [District Court] Judge Whitehurst expressly found that the acts of appellant establishing probable cause of guilt of the financial crimes were "for the private financial benefit of the defendant."

311 F.2d at 558.

The Fifth Circuit then opined:

> Even though characterized as a dictator, appellant was not himself the sovereign—government—of Venezuela within the Act of State Doctrine. He was chief

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criminal offense under the laws of that nation. J.A. 348-352. Indeed, Defendant Akindele (a Nigerian national, J.A. 18, 35, 57) committed a criminal offense under Nigerian law when he caused the Panamanian bearer share corporations, Deriks and Los, to accept the bribes paid by the Kirkpatrick defendants, irrespective of the ultimate disposition of the funds. J.A. 350-351.

17. These cases involve the recipients of the bribes/corruption; the present case involves the payors.

executive, a public officer, of the sovereign nation of Venezuela. It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies.

* * *

Appellant's acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained as to which probable cause of guilt had been shown were not acts of Venezuela sovereignty. Judge Whitehurst found that each of these acts was "for the private financial benefit" of the appellant. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an "Act of State".

311 F.2d at 557-58.

The relevant holding in *Jimenez* was:

The acts constituting crimes charged for which the extradition of appellant is sought are not "acts of Venezuela" as in Hernandez, and the Act of State Doctrine is no bar to this extradition proceeding or justification for the discharge from custody of appellant.

311 F.2d at 558.

The Second Circuit reached the same conclusion in *Marcos*, 806 F.2d 344 (2d Cir. 1986). There, an appeal was taken from an injunction affecting title to five parcels of real estate acquired by, and beneficially owned by, former Philippine President Ferdinand Marcos. The land purportedly was acquired with funds received, at least in part, via bribes and kickbacks, *id.* at 346-48. As one defense, the defendants urged the act-of-state doctrine saying that the doctrine "prohibits adjudication in our court of the legality of the acts of a foreign head of state within his own country", *id.* at 357. After first alluding to the basic tenets of the doctrine, the Second

Circuit focused on the central proposition that the doctrine pertains only to "public acts of the *sovereign*" (*id.* at 358) (emphasis in original), and concluded:

> Appellants simply fail to make the crucial distinction between acts of Marcos as head of state, which may be protected from judicial scrutiny even if illegal under Philippine law, and his purely private acts. Although the distinction between public and private acts of a foreign official may be difficult to determine, our courts have repeatedly done so. *See Dunhill*, 425 U.S. at 695, 96 S.Ct. at 1862 ("Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach.") (citations omitted).
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> * * *
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> In short, the district court will necessarily scrutinize the acts that The Republic challenges. Defendants must present evidence that these acts were public (e.g., that Marcos's wealth was obtained through official expropriation decrees or public monopolies). The court then must decide whether to examine these public acts in light of the considerations discussed above. If it chooses not to do so—and the determination whether the Marcoses obtained their wealth illegally, and hence the determination of ownership of the property at issue in this case, is impossible without such scrutiny—the court should consider defering to a Philippine adjudication that comports with due process. But in any event, at this stage we agree with the position of the United States quoted above that the defendants have not discharged their burden of proving an act of state. Only after that burden is met do other relevant factors need to be considered.

806 F.2d at 359-60.

Commentators who have addressed the interrelationship between questionable overseas payments and the act-of-state doctrine likewise agree that no act-of-state, *qua* act-of-state, is

implicated in the payment, or receipt, of bribes.[18] For example, even before enactment of the Foreign Corrupt Practices Act, Prof. Charles R. McManis, wrote as follows:

> International comity and separation of powers, the underpinnings of the act of state doctrine, argue for applying it only where the alternative is judicial evaluation of the validity of an exercise of public authority—a judicial ruling, a legislative enactment, a regulatory decree, or an executive use of police powers. . . . [T]he local legality and authoritativeness of an official's conduct should be considered in deciding whether that conduct was an act of state. Since acceptance of corporate payments seems to violate foreign laws and, judging from the recent reactions of foreign governments, to overstep the limits of official authority, it would be inappropriate to invoke the

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18. In fact, one commentator, Prof. Michael J. Bazyler, foretold the decision of the District Court here:

> Another important federal law regulating the practice of American business in the international marketplace is the Foreign Corrupt Practices Act of 1977 (FCPA). The FCPA prohibits the payment of bribes by American businesses to officials of foreign governments on the grounds that such activities hurt rather than help our foreign commerce. The executive branch, through the Justice Department, enforces the Act by bringing suit against the American offender. The FCPA has also been interpreted to include a private enforcement mechanism that permits private parties to file suit for damages.
>
> Private litigants may find, however, that their suits are barred by the act of state doctrine. Since the violation is, by definition, a payment to a foreign official, inherent in every private suit under the FCPA is the involvement of a foreign government. Adjudicating FCPA enforcement actions will nearly always require an examination of the reasons for the payment and the motivation of the foreign official in accepting the payment. Courts might therefore invoke the act of state doctrine as a convenient excuse to avoid deciding difficult FCPA cases.

Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 380-81 (1986) (footnotes omitted).

act of state doctrine to protect corporations that induce such conduct by government officials.

McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 Yale L.J. 215, 236-37 (1976) (footnotes omitted).

See also Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 Va. J. Int'l Law 211, 251-52 (1987); Note, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L.J. 407 (1984); Note, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 Am. U.L. Rev. 203 (1984); Note: *Int'l Law-Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases?*, 59 Notre Dame L. Rev. 455 (1984).[19]

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19. In defining the act-of-state doctrine, §443 of *The Restatement (Third) of the Foreign Relations Law of the United States* (1987), similarly requires a threshold determination that the acts sought to be placed under scrutiny be "acts of a *governmental character* done by a foreign state within its own territory and applicable there." (Emphasis supplied.) *Comment i* further expands on the substance of, and procedure as to, this initial determination:

> *i. Form and proof of act of state.* The act of state doctrine applies to acts such as constitutional amendments, statutes, decrees and proclamations, and in certain circumstances to physical acts, such as occupation of an estate by the state's armed forces in application of state policy. An official pronouncement by a foreign government describing a certain act as governmental is ordinarily conclusive evidence of its official character. An action or declaration by an official may qualify as an act of state, but only upon a showing (ordinarily by the party raising the issue) that the official had authority to act for and bind the state. . . . The burden of establishing the act and its character as an act of state is on the party invoking the doctrine. The act of state doctrine does not preclude an initial inquiry as to whether a challenged act is in fact an act of state, whether scrutiny of the act is necessary to a litigant's claim or defense, or whether one of the suggested exceptions to the doctrine applies.

The *Restatement* does not address itself to questions of bribery or extortion

There is, of course, no doubt that bribery/extortion is *not* a public act and is *not* an exercise of sovereign power.[20]

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but does, in Section 443, *Comment c*, describe a somewhat analogous situation of universal condemnation:

> A claim arising out of an alleged violation of fundamental human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.

20. "Virtually every nation treats bribery of its officials as a crime. J. Noonan, Bribes 702 (1984); Driscoll, The Illegality of Bribery: Its Roots, Essence and Universality, 14 Cap. U.L. Rev. 1,13-38 (1984); Note, Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad, 10 Cornell Int'l L.J. 231, 235 & n. 26 (1977); see also Goldstein, European Views of United States Anti-Bribery and Anti-Boycott Legislation, 1 Nw. J. Int'l L. & Bus. 363 (1979) (every major European nation prohibits bribery of its officials); Suse, Questionable Payments in the Middle East: Potential Liability of American Corporations, 4 J. Comp. Corp. & Sec. Reg. 101 (1982) (examining anti-bribery laws of seventeen Middle Eastern nations). Somewhat less consensus exists with respect to bribing employees of private enterprises; *i.e.*, commercial bribery. Many nations also treat this as a crime. See, e.g., The Prevention of Corruption Act, 1906, 6 Edw. 7, ch. 34, amended by the Prevention of Corruption Act, 1916, 6 & 7 Geo. 5, ch. 64; Code pénal arts. 177, 179 (Fr.): Gesetz gegen den unlauteren Wettbewerb §12, 1909 Reichsgesetzblatt [RGB1] 499, 502 (as amended) (W. Ger.) (Act Against Unfair Competition); see generally 1 Pinner's World Unfair Competition Law Topic No. 12, Bribery (H. Dawid 2d ed. 1978) (survey of foreign commercial bribery law). For a discussion of U.S. federal and state laws criminalizing commerical [sic] bribery, see Perrin v. United States, 444 U.S. 37, 41-45 (1979). Even where such conduct is not criminal, it typically gives rise to civil liabilities. See generally H. Lidgard, C. Rohwer & D. Campbell, A Survey of Commercial Agency 32, 66, 126, 216, 434-35, 480-81 (1984). No nation other than the United States, however, prohibits bribery of another country's officials or bribery occurring outside its territory. Noonan, supra, at 680; see also Goldstein, supra, at 364 (no western European nation has such a statutory prohibition)."

Gevurtz, *supra*, at 212-13, n. 4.

Indeed, in the course of Congressional hearings leading to the enactment of the Foreign Corrupt Practices Act, Gen. (ret.) John J. McCloy, Chairman of the special review committee which investigated Gulf Oil's political contributions abroad, made the following statement:

> In the course of the Gulf committee's investigation, we could not identify a single country where a bribe of a government official to induce a government to enter into a contract with any company for the supply of its product to that government was not illegal in that country.

Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 6 (1976).

Article 38, ¶1(c) of the Statute of the International Court of Justice proscribes bribes; at least 65 sovereign nations proscribe bribes;[21] and various international resolutions, treaties, concordats and agreements of the United Nations, the Organization of American States, the Organization for Economic Cooperation and Development, and the International Chamber of Commerce all reflect the universal, unanimous conclusion that bribery is unacceptable behavior in the modern business world.[22] Indeed, the American Foreign Corrupt Practices Act is a unique expression of this universal morality in its attempt to control extraterritorial corruption by domestic corporations and American citizens. *See* Gevurtz, *The United States Approach to Combating Bribery in the International Sale of Goods*, Survey of the Int'l Sale of Goods 333, 337-43 (1986).

Congress, of course, found bribery to be unethical, to cause the public to lose confidence in the free market system, to taint the credibility of American corporations, and to *cause*

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21. *See*, Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 Cornell Int'l L.J. 231, 235-36 (1977).

22. See, Note, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L.J. 407, 420-21, n. 105-08, for a collection of relevant international public documents.

foreign policy problems for the United States by causing embarrassment with friendly nations and by reinforcing (or at least aggravating) suspicion as to American motives in less friendly nations.[23] Hence, to remedy these problems, Congress enacted the Foreign Corrupt Practices Act.

It would be incongruous now to conclude, as Petitioners urge, that conduct universally condemned by the business world (indeed, by the world irrespective of its "business" nature) and made subject to specific criminal sanctions by the American Congress, is somehow transmogrified into a public act of sovereign authority to be screened from judicial attention in the American courts. The admitted acts of the Kirkpatrick defendants are, without more, violations of the Foreign Corrupt Practices Act, of the RICO Statute, of the Robinson-Patman Act, of the New Jersey RICO statute, and of the common law. They are criminal acts and civil wrongs, not acts of state.[24]

III. ASSUMING, *ARGUENDO*, THE PRESENCE HERE OF AN ACT OF STATE, THE *SABBATINO* TEST IS SATISFIED AND THE DOCTRINE DOES NOT APPLY TO THIS CASE.

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court, per Mr. Justice Harlan, sought to restate the jurisprudential principle under which American courts

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23. See, *passim*, H.R. Rep. No. 640, 95th Cong., 1st Sess. (1977); S. Rep. No. 114, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 4098; S. Rep. No. 1031, 94th Cong., 2d Sess. (1976).

24. Given Petitioners' suggestion of Nigerian public interest in not disclosing corruption, Brief for Petitioners 32-33, it is worth noting that the Nigerian government in power at the time of this contracting was ousted by a coup on the last day of 1983 with the result that, "[t]here was widespread relief that a corrupt and inefficient government had been removed with little bloodshed." 1985 Britannica Book of the Year 471. And, as appears from this record, the Republic of Nigeria is fully informed as to the specific allegations of this case, J.A. 45-46, 124, but has taken no steps to intervene or interfere with the proceeding in any way. Hence, it seems unlikely that Nigeria fears any embarrassment in having further disclosure of corruption under a predecessor regime.

will adjudicate matters which bring into question the governmental acts of foreign sovereigns. In doing so, the Court rehearsed the "classic" American statement of the act-of-state doctrine found in *Underhill v. Hernandez*, 168 U.S. at 252, as further elucidated by this Court in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), and *Ricaud v. American Metal Co.*, 246 U.S. 297 (1918). *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 416-18.[25]

Having declared that the act-of-state doctrine is neither compelled by the "inherent nature of sovereign authority . . . or by some principle of international law . . . or the text of the [United States] Constitution . . .", 376 U.S. at 421, 423, the Court went on to define the rationale for the act-of-state doctrine:

> The act of state doctrine does, however, have 'constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

376 U.S. at 423.

In order to determine whether the act-of-state doctrine

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25. In this case, in contrast to the "classic" act-of-state cases in this Court, the validity of no governmental action is called into question—*i.e.*, no attempt is made in this litigation to rescind the commercial contract between Petitioner and the Republic of Nigeria nor is any claim made for compensation from Nigeria itself. Neither are there questions of "title" to real estate or tangible or intangible property raised here. Hence, the "classic" concerns reflected in *Underhill, Oetjen* and *Ricaud* are not present here. It is, therefore, appropriate to commence an analysis of this case with this Court's decision in *Sabbatino*.

appropriately reflects the "proper distribution of functions between the judicial and political branches of the government on matters bearing upon foreign affairs," 376 U.S. at 427-28, the Court identified two controlling variables:

> [1] [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . [2] It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches

376 U.S. at 428;
and rendered its narrow holding on the facts of the case as follows:

> [W]e decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id.

In *Sabbatino,* in considering the first variable—"the degree of codification or consensus concerning a particular area of international law"—this Court said:

> There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.

Id. (footnote omitted).

In this case, and in contrast, present international opinion is unanimous that bribery, extortion and corruption of governmental processes—be they foreign or domestic—are intolerable. See, *supra,* pp. 30-32. In this very case, it is stipu-

lated that bribery—offering or giving gratification to a public servant—or the profiting from such bribery is a violation of Nigerian criminal laws punishable, at the time of these offenses, by, respectively, imprisonment of three years and/or imposition of a fine or imprisonment for one year and/or imposition of a fine. J.A. 348, *et seq.* Indeed, at no time during the criminal proceedings related to this case, or during the civil proceedings below, have Petitioners ever sought to deny the criminality of their conduct. Hence, the first variable upon which application of the act-of-state doctrine depends as identified in *Sabbatino*—the degree of codification or consensus concerning the particular area of law—is fully satisfied here. Accordingly, consideration of that variable under the *Sabbatino* formulation dictates that the act-of-state doctrine not apply to this case.

The second consideration identified in *Sabbatino* as being pertinent to application of the act-of-state doctrine is the importance of the issue for American foreign relations. 376 U.S. at 428. In *Sabbatino*, this Court determined that that variable dictated application of the act-of-state doctrine, in essence because of: (a) the Executive Branch's failure to take a position in the context of the *Sabbatino* litigation on the substantive issue of the legality of Cuba's expropriation; (b) the existence of claims to compensation by many other American citizens, almost none of which were before the courts; and (c) the questions of title which would arise as to many disparate properties, only one of which (belonging to one litigant) was before the Court. In short, the *Sabbatino* Court discerned a serious risk of confusion—even, perhaps, conflict—between the Judicial and the Executive Branches were the courts to render a decision on the validity of Cuba's expropriation of property.

Here, to the contrary, there is no such risk of confusion or conflict. First, and foremost, the conduct in question is not that of the sovereign state of Nigeria; it is the conduct of American corporations and individuals, Petitioners here.[26]

26. Suggestions are made throughout Petitioners' filings with this Court that the contract award will have to be shown—by direct evidence—

Second, the conduct in question has been exposed fully in the American criminal prosecution (J.A. 15, 33).

Third, there are no other claims against Nigeria on behalf of other American citizens arising out of this transaction.

Fourth, there are no title questions.

Fifth, the Executive Branch, by the letter response of Judge Sofaer to District Judge Lechner, has taken the straightforward position—in contrast to its "no comment" position in *Sabbatino*— that this litigation may proceed without threatening foreign relations with the Republic of Nigeria. J.A. 267. Judge Sofaer said:

> As the Department understands the allegations in the instant suit, the validity of the Nigerian Government's decision to award the contract in question is not in question. If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute.

J.A. 268-69.

Sixth, and finally, the fact of the litigation and the claims thereby asserted, as well as the conduct of the Nigerian officials thereby ostensibly placed in question, have been placed squarely before the Nigerian Ambassador as of July 31, 1986, J.A. 124, and there have been no objections by the Republic of Nigeria to the pursuit of this litigation to date.

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to have been the result of bribes in fact paid by Petitioners to one or more Nigerian high-level government officials. Such, of course, is not the case. See fn.10, *supra*.

To the extent Petitioners seek to interpose the contention that bribery was a *sine qua non* of transacting business with the Republic of Nigeria and that Respondent would not have received the contract but for such payments, both of which propositions are denied by Respondent, such contentions are matters of affirmative defense as to which Petitioners bear the burden of proof. Thus, the focus of the "act" in question must be on the conduct of the American corporations and their representatives, not on the conduct of any foreign government official.

In a word, consideration of the second variable identified by the *Sabbatino* Court as being pertinent to application of the act-of-state doctrine likewise demonstrates that this litigation, and the issues presented thereby—the endeavors of an American corporation to corrupt the government of a Third World country—have no implications whatsoever as to the foreign relations between the United States of America and the Republic of Nigeria.

In sum, application of the *Sabbatino* formulation of the act-of-state doctrine, and its twin variables, to the facts in this case points unequivocally to the justiciability of this dispute, the duty of the courts below to hear and resolve the questions presented, and the inapplicability of the act-of-state doctrine.[27]

IV. FURTHER ASSUMING, *ARGUENDO*, THE PRESENCE OF AN ACT-OF-STATE HERE, AND ASSUMING THE APPLICABILITY OF THE DOCTRINE TO THESE FACTS, A "COMMERCIAL ACTIVITY" EXCEPTION TO THE DOCTRINE SHOULD BE ADOPTED BY THIS COURT AND APPLIED TO THE FACTS OF THIS CASE.[28]

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27. The *Sabbatino* analysis—both in this Court's opinion and in the foregoing discussion—continues to apply even after *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), and *Alfred Dunhill of London v. The Republic of Cuba*, 425 U.S. 682 (1976). In each of those cases, irrespective of the "splintered decisions" (Brief for the United States as *amicus*, p. 8), the four dissenting Justices explicitly adhere to the *Sabbatino* analysis, *see, e.g.*, 406 U.S. at 789 (Brennan, J., dissenting), and the plurality opinions adhere to the core of *Sabbatino* while identifying—and seeking to apply—exceptions to the applicability of the doctrine as so defined. Ergo, the analysis in the text, supra, whereby the *Sabbatino* standard is applied to the facts of this case satisfies the underpinnings of both *First National City Bank and Alfred Dunhill*.

28. Various exceptions to the act-of-state doctrine, in addition to the commercial activity exception, have been identified by the commentators and employed by the courts. *See, e.g.*, Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325 (1986); and *Modern Status of the Act of State Doctrine*, 12 ALR. Fed. 707 (1972, 1988 Supp.). One of the excep-

In *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976), four Justices of this Court, speaking through Mr. Justice White, declined to extend the act-of-state doctrine to acts committed by foreign sovereigns in the course of their purely commercial activities (425 U.S. at 707).[29] There, adopting arguments advanced by the Solicitor General of the United States, taking into account expressions of Executive Branch principles of sovereign immunity going back as far as the Tate letter of 1952, and considering the established line of authority distinguishing governmental actions of sovereign states on the one hand from their private and commercial acts on the other, the Court found no basis for imposition of an act-of-state preclusion to justiciability. 425 U.S. at 706.

The case involved the question whether the Republic of Cuba was subject to a money judgment for funds remitted to

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tions—the fraud or corruption exception—is more correctly seen not as an exception to, but as a negation of, the act-of-state concept and is, therefore, addressed at pp. 23-32, *supra*, of this Brief. A second exception—the motivation vs. validity exception—was relied on both by the State Department in Judge Sofaer's letter and by the court below. Respondent concurs with the existence of the exception and with its applicability to the facts of this case. In addition, Respondent relies on the explication of the exception and its application to the facts of this case as set forth in the merits Brief of the United States as Amicus Curiae in this case. A third exception—the so-called *Bernstein* exception—was accepted by three Justices of this Court in *First National City Bank* where this Court said, per Mr. Justice (now Chief Justice) Rehnquist:

> [W]here the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.

406 U.S. at 768.

Were the *Bernstein* exception to be adopted by this Court in the instant case, the decision of the court below must, obviously, be affirmed. That is, Judge Sofaer's letter to the District Judge below satisfies this rule. See, also, *infra*, pp. 46-50.

29. The decision of the Court, of course, turned on the joinder by Mr. Justice Stevens in the conclusion of the four Justice plurality that there was a failure to prove an "act of state" below. 425 U.S. at 716.

Cuba post-expropriation for cigars shipped to, and received by, the remitting American importers *before* expropriation. 425 U.S. at 687. In opining that the refusal of Cuba to return the mistakenly paid funds was not a public act but was merely a commercial act, to which the act-of-state doctrine does not apply, Mr. Justice White wrote:

> Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach.

425 U.S. at 695.

> It is the position of the United States, stated in an *amicus* brief filed by the Solicitor General, that such a line should be drawn in defining the outer limits of the act of state concept and that repudiations by a foreign sovereign of its commercial debts should not be considered to be acts of state beyond legal question in our courts.

425 U.S. at 696.

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S., at 427-428, 431-433. But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary, for the reasons to which we now turn, we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be

recognized as an act of state and immunized from question in our courts.

Although it had other views in years gone by, in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions.

425 U.S. at 697-98.

Since that time, as we have said, the United States has adopted and adhered to the policy declining to extend sovereign immunity to the commercial dealings of foreign governments.

425 U.S. at 701-02.

[S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."

425 U.S. at 703-04 (footnote omitted).

For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "Act of State" than if it is given the label "sovereign

> immunity". In describing the act of state doctrine in the past we have said that it "precludes the courts of this country from inquiring into the validity of the *public* acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino, supra,* 376 U.S., at 401 (emphasis added), and that it applies to "acts done within their own States, in the exercise of *governmental* authority." *Underhill v. Hernandez,* 168 U.S., at 252 (emphasis added). We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations. Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba's agents in the operation of cigar businesses for profit, the act was not an act of state.

425 U.S. at 705-06 (footnote omitted).

Then, subsequent to this Court's decision in *Alfred Dunhill,* Congress enacted the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-11.[30] This Court has described Congress' interest in passing the Act as follows:

> In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing

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30. Congress' findings as to, and declaration of purpose for, the statute are as follows:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. §1602.

> standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process," H.R.Rep. No. 94-1487, p. 7 (1976). To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.
>
> For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity.

Verlinden B.V. v. Central Bank of Nigeria, 416 U.S. 480, 489 (1983).[31]

> Amongst the provisions of the Act is the following:
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> * * *
>
> . . . [where the] action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

28 U.S.C. §1605(a)(2).

In the definition section of the Act, the following appears:

> A "commercial activity" means either a regular

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31. In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), of course, this Court has unanimously ruled that even though the Foreign Sovereign Immunities Act did not "control the determination" of the issue there presented, "our resolution of that question [whether Citibank might set off the value of its seized Cuban assets against Bancec's claim] is guided by the policies articulated by Congress in enacting the Foreign Sovereign Immunities Act." 462 U.S. at 621. See, also, 462 U.S. at 628, 629. No act-of-state issue was raised in that case. 462 U.S. at 635, n. 28.

> course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. 1603(d).

Hence, if the instant transaction—the sale by an American corporation of aeromedical supplies and equipment to the Republic of Nigeria for use by the Nigerian Air Force—constitutes "commercial activity" within the foregoing definition, Nigeria would not itself be immune from suit if litigation were instituted in America with respect to a breach of the contract—*e.g.*, non-payment—by Nigeria.

The transaction is, notwithstanding the opinion of the court below, "commercial activity":[32]

> The legislative history of FSIA specifically establishes that a transaction retains its commercial nature even though the purchasing government proposes to use the goods for military purposes:
>
> > As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. *Thus, a contract by*

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32. In the court below, ETC argued the applicability of the "commercial activity" exception. The court below, mandated to do so by Third Circuit Internal Operating Procedure 8C, rejected the argument on the authority of its earlier decision in *Williams v. Curtiss-Wright*, 694 F.2d at 302, saying:

> While the act of contracting will in many circumstances be properly characterized as commercial conduct, the decision to award a defense contract to one bidder or another is by its very nature governmental.

J.A. 328; 847 F.2d at 1059.

We respectfully disagree. We believe the correct reading of "commercial activity" is to be founded in Mr. Justice White's opinion in *Alfred Dunhill*, in the legislative history of the Foreign Sovereign Immunities Act and in the cases collected in *McDonnell Douglas Corp. v. Islamic Rep. of Iran*, 758 F.2d 341, 349 (8th Cir. 1985).

> *a foreign government to buy* provisions or *equipment for its armed forces or to construct a government building constitutes a commercial activity.* The same would be true of a contract to make repairs on an embassy building. *Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.*

H.Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6615 (emphasis added).

McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 348-49 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985).

Thus, in the *McDonnell Douglas* case, *supra*, where the transaction involved "the sale of certain parts for damaged F-4 aircraft" and Iran asserted a sovereign immunity defense to McDonnell Douglas' declaratory judgment action concerning liability *vel non* for breach of a sales agreement with the Iranian Air Force, the Court of Appeals, having alluded to the foregoing legislative history, noted that:

> [S]everal cases construing FSIA also make clear that a contract by a foreign government to buy equipment for its armed services constitutes a commercial activity to which sovereign immunity does not apply

758 F.2d at 349;[33]
and ruled

> In sum, the language of FSIA, its legislative history and recent case authority all confirm conclusively that the intent of the purchasing sovereign to use the goods for military purposes does not take the transaction out-

33. The cited cases are: *Texas Trading & Milling v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Behring Int'l v. Imperial Iranian Air Force*, 475 F.Supp. 383 (D.N.J. 1979); *National American Corp. v. Federal Republic of Nigeria*, 448 F.Supp. 622 (S.D.N.Y. 1978).

> side of the "commercial" exception to sovereign immunity. Accordingly, the district court's rejection of Iran's sovereign immunity claim is affirmed.

Id.

In short, the instant transaction does involve "commercial activity" and Nigeria, were it a party to this lawsuit (or any suit concerning the contract), would not enjoy the defense of sovereign immunity.

> [T]he commercial exception enacted in the FSIA logically compels that a similar exception to the act of state doctrine be recognized. The FSIA embodies an implicit legislative judgment that suits against foreign governments based upon their commercial activities are not detrimental to U.S. foreign policy interests. To dismiss such suits on the ground that they require review of acts of state contravenes this judgment. It is even more unjustified to preclude actions against private defendants because they involve activities for which the foreign states themselves enjoy no immunity. . . . [B]ribery to influence government procurement should not be beyond judicial review.

Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 Virginia Journal of Int'l Law 221, 255-56 (1987) (footnotes omitted).

Indeed, as Professor Gevurtz notes:

> It is true that Congress did not expressly engraft a commercial activity exception onto the act of state doctrine when it passed the FSIA. Nevertheless, no negative implication can be taken from this fact. The legislative history suggests Congress was under the impression that such a step was unnecessary for it thought that the courts had already recognized this exception. H.R. Rep. No. 1487, supra note 243, at 20 n.1, reprinted in 1976 U.S. Code Cong. & Admin. News at 6619 n. 1.

Gevurtz, *id.*, at 256, n. 252.

Accordingly, where, as here, the foreign government can-

not itself avoid responsibility in civil litigation under the terms of the Foreign Sovereign Immunities Act, a private party likewise may not avoid liability by virtue of the act-of-state doctrine. For this reason, this Court should adopt—and apply to this case—a commercial activity exception to the act-of-state doctrine coextensive with the "commercial activity" exception to foreign sovereign immunity under the Foreign Sovereign Immunities Act.

V. A PROPOSAL AS TO REDEFINITION OF THE ACT-OF-STATE DOCTRINE.

While the Court has not specifically ordered counsel to brief the question "Should this Court's holding in [*Sabbatino*] be reconsidered?",[34] and while the judgment of the court below may be affirmed on any of the grounds set out in the preceding portions of this Brief, Respondent respectfully urges a reconsideration of—and redefinition of—the doctrine so as to guide future litigants in general, the lower federal courts and, in particular, the future progress of this case.

Simply put, Respondent urges the adoption of the dissenting opinion of Mr. Justice White in *Sabbatino*, at least insofar as it: (a) addresses the "unassailable propositions" that constitute the underpinning of the act-of-state doctrine (376 U.S. at 450-51); and (b) provides the procedure for appropriate Executive Branch intervention on a "reverse *Bernstein*" basis, 376 U.S. at 467-68.[35]

The "unassailable propositions" are, of course:

> . . . that our courts are obliged to determine controversies on their merits, in accordance with the applicable law; and that part of the law American courts are bound to administer is international law.

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34. *Compare Alfred Dunhill*, 425 U.S. at 690-91 n. 5.

35. A "reverse *Bernstein*", as opposed to the classic *Bernstein*, approach would avoid the Constitutional issues sometimes urged against the classic *Bernstein* approach (see, *e.g.*, Brief for Petitioners at 35) and would, in any event, avoid the "errand boy" concern expressed, *inter alia*, by Mr. Justice Douglas. *First National City Bank, supra*, 406 U.S. at 771.

Sabbatino, 376 U.S. at 450-51.

Key to this concept, obviously, is that the courts are "obliged" to determine controversies. It is unseemly that an American citizen—Environmental Tectonics Corporation—might be deprived of its deserved monetary relief by the fortuitous fact that other American citizens—the defendant Kirkpatrick corporations—bribed officials of a foreign country, instead of bribing officials of a private corporation, be it domestic or foreign, or officials of an American governmental agency.

As Judge Kaufman noted for the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), Congress intended to regularize and ensure "access to the courts" in cases encompassed by the Foreign Sovereign Immunities Act, 647 F.2d at 312-13, quoting from *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6605-06. ETC should be entitled to no less "access to the courts" against these Defendants.

The recently enacted statute concerning American judicial enforcement of arbitration agreements and awards in international trade likewise demonstrates a greater Legislative Branch confidence in the abilities of the Judicial Branch to apply the law than the Judicial Branch apparently has in itself when it applies the act-of-state doctrine. Pub. L. 100-669, §1, Nov. 16, 1988, 102 Stat. 3969, codified as 9 U.S.C. §15.[36] That is, were this a dispute subject to arbitration, ETC would be entitled to access to the courts; ETC is entitled to no less on the facts of this case.

The courts were created by Article III, §2, of the United States Constitution for the purpose of hearing "all cases" and

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36. Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. §15.

"controversies" between citizens of the several States. The enactment by Congress of, *inter alia*, the Foreign Sovereign Immunities Act, as well as the Second Hickenlooper Amendment, 22 U.S.C. §2370(e)(2), validated the wisdom of Mr. Justice White's views. Indeed, the search for exceptions to the act-of-state doctrine by the Courts, and the near-Talmudic exegetical exercises by the commentators with respect to the doctrine, themselves bespeak the desirability of a turn to a simpler, clearer approach [37] In truth, save and except litigants such as Petitioners here, and the *amicus* Republic of China, it is well nigh impossible to find an advocate for the doctrine in its present form.

Second, the procedure suggested by Mr. Justice White would, of course, put the onus on the State Department to ". . . render a determination [as to applicability of the doctrine] after reasonable notice, in each case . . .":

> Such an examination would permit the Department to evaluate whether adjudication would "vex the peace of nations," whether a friendly foreign sovereign is involved, and whether settlement through diplomacy or through an international tribunal or arbitration is impending. Based upon such an evaluation, the Department may recommend to the court that adjudication should not proceed at the present time. Such a request I would accord considerable deference and I would not require a full statement of reasons underlying it. But I reject the contention that the recommendation itself

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37. An article to be published in the November 1989 issue of The Villanova Law Review, Dellapenna, *Deciphering the Act of State Doctrine*, 35 Vill. L. Rev. ___ (manuscript dated 9/6/89), collects most—if not all—the decisional authority and learned commentary to date on the doctrine. (Curiously, the article does not include a discussion of the motivation versus validity distinction.) Even if one rejects some or all of the theses expounded in the article (as we do), it does demonstrate beyond peradventure the confusion surrounding the act-of-state doctrine and the need for redefinition, in particular a redefinition which is clear, simple in application and not likely to lead to further demands on this Court's docket. Hence, the proposal herein.

> would somehow impede the foreign relations of the United States or unduly burden the Department.

Sabbatino, 376 U.S. at 468.[38]

The District Court's judgment in response to the State Department's recommendation would, of course, be subject to review under an abuse of discretion standard. Indeed, the procedure conceptualized by Mr. Justice White and urged here is precisely that adopted by Congress in the Second Hickenlooper Amendment, 22 U.S.C. §2370(e)(2). There, if the Executive deems act-of-state concerns to be implicated, the court *shall* decline to act *provided* the "President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." 22 U.S.C. §2370(e)(2).

So, too, for the usual grist of the litigation mill as it touches upon foreign nations, especially in this age of burgeoning internationalism: if the Executive has a legitimate interest in superimposing a foreign relations stopper on a lawsuit, let it say so; otherwise, such lawsuits are like—and should be treated like—any other.

As Mr. Justice Powell said, while concurring in *First National City Bank*:

> Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this. This view is not inconsistent with the basic notion of the act of state doctrine which requires a balancing of the roles of the judiciary and the political branches. When it is shown that a conflict in those roles exists, I believe that the judiciary should defer because, as the Court suggested in

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38. Presently, of course, the Attorney General must receive notice of any claim asserting the unconstitutionality of any federal statute. 28 U.S.C. §2403. There seems to be no impediment to instituting a similar procedure as to act-of-state claims whereby notice to the appropriate official at the State Department would be required.

> *Sabbatino*, the resolution of one dispute by the judiciary may be outweighed by the potential resolution of multiple disputes by the political branches.
>
> In this case where no such conflict has been shown, I think the courts have a duty to determine and apply the applicable . . . law.

406 U.S. at 775-76.

In sum, international developments since the decision in *Sabbatino*, the experience of the courts in attempting to limn the boundaries of the act-of-state doctrine, and the Congressional enactments reflected in the second Hickenlooper Amendment, in the Foreign Sovereign Immunities Act, and in the Arbitration Act Amendment all point in the same direction: a need for the federal courts to adhere to their usual Constitutional duty to hear and decide cases subject to a discretionary refusal to exercise jurisdiction when confronted with a compelling reason for such refusal, appropriately articulated by the Executive Branch.

CONCLUSION

For each of the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

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